TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963 4

No. [redacted] 8

ROBERT L. SCHLAGENHAUF, PETITIONER,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA.

PETITION FOR CERTIORARI FILED OCTOBER 18, 1963

CERTIORARI GRANTED JANUARY 13, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 569

ROBERT L. SCHLAGENHAUF, PETITIONER,

vs.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA.

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., APRIL 13, 1964

[fol. 1] [File endorsement omitted]

[fol. 2]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

PETITION FOR WRIT OF MANDAMUS TO HONORABLE CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA—Filed March 13, 1963

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

1. Your petitioner, Robert L. Schlagenhauf, is a citizen and resident of the State of Indiana and is a party defendant in an action instituted in the United States District Court for the Southern District of Indiana, on July 17, 1962, entitled John Anthony Markiewicz, a minor, by his father and next friend, Edward Markiewicz, and Edward Markiewicz and Jennie Markiewicz in their own right v. The Greyhound Corporation, Robert L. Schlagenhauf, Joseph L. McCorkhill and Contract Carriers, Inc., No. IP 62-C-285, assigned to the calendar of Honorable Cale J. Holder, Judge of said District Court. On November 8, 1962, an amended complaint was filed by the plaintiffs naming National Lead Company, a corporation, as an additional defendant.

2. In the said action, the plaintiffs seek to obtain damages for personal injuries and loss of services by reason of the defendants' alleged negligence in causing a collision between a bus owned by the defendant The Greyhound Corporation and driven by the defendant Robert L. Schlagen-

hauf and a trailer owned by the defendant National Lead Company and pulled by a tractor owned by the defendant Contract Carriers, Inc. and driven by the defendant Joseph L. McCorkhill, on July 13, 1962 in Hendricks County, [fol. 3] State of Indiana.

3. On July 30, 1962, the defendant The Greyhound Corporation in said action filed its cross-claim against the defendants Contract Carriers, Inc. and National Lead Company and on January 21, 1963 filed its amended cross-claim against Contract Carriers, Inc., National Lead Company, and General Motors Corporation, an added defendant. In the said amended cross-claim, the defendant The Greyhound Corporation seeks to obtain damages for the damage to its motor bus and for the loss of use thereof by reason of the alleged negligence of the named cross-defendants in causing the said collision.

4. At the time the said actions of the plaintiffs were commenced, the plaintiffs were citizens of the State of Pennsylvania; the defendant The Greyhound Corporation was a corporation organized and existing under the laws of the State of Delaware with its principal office in the State of Illinois; the defendant Contract Carriers, Inc. was a corporation organized and existing under the laws of the State of Indiana with its principal office in the State of Indiana; the defendant Joseph L. McCorkhill was a citizen of the State of Indiana; and the defendant National Lead Company was a corporation created and existing under the laws of the State of New Jersey with its principal office in the State of New York, and the amounts in controversy exceed the sum of $10,000 exclusive of interest and costs.

5. On February 5, 1963, the defendants Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company filed their joint petition for an order requiring the defendant Robert L. Schlagenhauf to submit to physical and mental examinations "by a competent, qualified specialist" in each of the fields of internal medicine, ophthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this

action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of [fol. 4] affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim." The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed.

6. On February 21, 1963 the Honorable Cale J. Holder entered an order sustaining the said petition and ordering the defendant Robert L. Schlagenhauf to submit to physical and mental examinations by all nine of the physicians nominated in the petition and that the nine examinations be completed by April 1, 1963. Copies of the order complained of, the petition for such order, the plaintiffs' amended complaint, the amended cross-claim of the defendant The Greyhound Corporation, the answer of defendants Contract Carriers, Inc. and Joseph L. McCorkhill to the original cross-claim and letter amending such answer are attached hereto, marked as Exhibits "A", "B", "C", "D", "E", and "F" respectively, and made a part hereof.

7. The issuance of the said order constitutes a clear abuse of discretion and grave miscarriage of justice in the following particulars:

(a) The petitioner Robert L. Schlagenhauf is not a party to the amended cross-claim in which the petitioning cross-defendants assert that the physical and mental condition of Robert L. Schlagenhauf is in controversy.

(b) The physical and mental condition of the petitioner Robert L. Schlagenhauf is not "in controversy" in either the plaintiffs' amended complaint or the amended cross-claim.

(c) Good cause has not been shown for the multiple examinations petitioned for by the cross-defendants.

(d) The petitioner Robert L. Schlagenhauf has been ordered to submit to nine separate physical and mental ex-

aminations even though the petition of the cross-defendants asked for only four such examinations.

[fol. 5] (e) The order of the respondent being not made in conformity to Rule 35 of the Federal Rules of Civil Procedure violated the petitioner Robert L. Schlagenhauf's substantive right of privacy and his constitutional rights under the 4th, 5th, and 13th Amendments of the Constitution of the United States.

Wherefore, petitioner prays that a writ of mandamus issue out of this court directed to the said Honorable Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, commanding him to vacate said order for the physical and mental examinations of Robert L. Schlagenhauf entered by him on February 21, 1963, and to do and perform such other acts and things as may be necessary and proper in the premises.

Smith & Yarling, By Robert S. Smith, 1313 First Federal Building, Indianapolis 4, Indiana.

Verification (omitted in printing).

[fol. 6]

EXHIBIT "A" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

ENTRY FOR February 21, 1963

Honorable Cale J. Holder, Judge

This cause came before the court upon the petition of the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the purview of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is

ORDERED, that the defendant, Robert L. Schlagenhauf, [fol. 7] hereby submit to physical and mental examinations by the following physicians:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Ophthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of April, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the court will then establish a time certain for the taking of said examinations.

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg. 111 Monument Circle, Indianapolis, Ind.;

Rocap, Rocap & Reese, 156 E. Market, Indianapolis, Ind.;

Townsend and Townsend, 120 E. Market, Indianapolis, Ind.

A. L. Payne, 501 Fidelity Bldg., Indianapolis, Ind.

Smith & Yarling, 1313 First Federal Bldg., Indianapolis, Ind.

Sheldon A. Breskow, 930 Lemcke Bldg., Indianapolis, Ind.

Edmund Pawelec, 517 Western Savings Fund Bldg., Philadelphia, 7, Pa.

[fol. 8]

EXHIBIT "B" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

Come now the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company and under the provisions of Rule 35 of the Rules of Civil Procedure, now respectfully petition the court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by a competent, qualified specialist in each of the following fields:

(1) Internal medicine; (2) Ophthalmology; (3) Neurology; (4) Psychiatry.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the defendant Greyhound's cross claim.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent experts, no one of which can examine the defendant [fol. 9] Schlagenhauf respective to all of the conditions which relate to his driving ability. These defendants respectfully request that one physician in each of the above listed categories be appointed and in this regard would respectfully shows to the court that there are competent, qualified individuals in the respective fields as follows:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Ophthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

These examinations can be performed without physical or mental suffering or embarrassment to the defendant,

Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Further reason for a physical and mental examination of the defendant Schlagenhauf is shown by Exhibit "A", an affidavit of one of defendant Contract Carriers, Inc. and Joseph L. McCorkhill's attorneys involving the following issues:

(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

[fol. 10] (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

Without examinations by a competent qualified physician in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense.

Wherefore, the defendants, Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company, respectfully pray that this court issue an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by one qualified specialist in the fields of internal medicine, ophthalmology, neurology and psychiatry, at a time convenient for the physicians and the defendant, Robert L. Schlagenhauf.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

ROCAP, ROCAP & REESE

By /s/ KEITH REESE
Keith Reese

Attorneys for National Lead Company

BRIEF IN SUPPORT OF PETITION FOR PHYSICAL AND MENTAL EXAMINATION

Rule 35 of the Federal Rules of Civil Procedure provides as follows:

"Rule 35. Physical and Mental Examination of persons.

(a) Order for Examination. *In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician.* The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions and scope [fol. 11] of the examination and the person or persons by whom it is to be made." (Emphasis added).

In the instant case, Robert L. Schlagenhauf is a named party defendant and the mental and physical condition of this defendant is in controversy.

The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have asserted that the defendant, Robert L. Schlagenhauf, did not have a proper mental or physical condition to operate a scenicruiser motorbus and that for this reason, the vehicles collided. If the defendant, Robert L. Schlagenhauf, was either mentally or physically unqualified to operate such a vehicle, then this truth should be

ascertained and the facts laid out for all to see. These examinations can be performed without any pain or suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf.

The issue of whether or not a defendant may be examined under Federal Rule 35(a) was also before the court in *Dinsel* v. *Pennsylvania Railroad Co.*, 144 F. Supp. 880 (W. D. of Pa. 1956), where the court was concerned with the problem of whether or not one who was not even a party could be examined and the court, at page 882, stated as follows:

> "(1, 2) It is the duty of the court to make positive that every trial is fairly and impartially conducted and that the verdict of the jury be rendered on the issues raised by the pleadings. It would, therefore, appear to be the duty of the court to make positive that the jury would not have to speculate or conjecture as to the condition of the eyesight of the employee, Echenrode, and to extend every help that might be possible, through the aid of medical science, to enlighten the court and jury of the vision of Echenrode on the date that the accident occurred.
>
> (3, 4) I believe authority exists in the District Court, when necessary to a proper consideration of a case by a court and jury, to appoint, without consent of the parties, an appropriate specialist in the field where a disputed issue of fact is raised, to express an opinion on the facts in dispute without prejudice, however, of either party to call, examine and cross-examine witnesses as if said examination had not been directed by the court, and that the examination made by order of court shall function as prima facie evidence of the facts found and conclusions reached, unless rejected by the court. It is further proper to tax the costs of such an examination together with the fees of said witnesses as costs of a case. Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919."

[fol. 12] We are not unmindful of the cases exemplified by *Kropp* v. *General Dynamics Corp.*, 202 F.Supp. 207 (E.D. Mich. 1962); *Fong Sik Leung* v. *Dulles*, 226 F.2d 74 (9th Cir. 1955); *Dulles* v. *Quan Yoke Fong*, 237 F.2d 496 (9th Cir. 1956), which have limited the power of the courts to require physical examination of those who are not parties to the action. However, as previously pointed out, Mr. Schlagenhauf is a defendant and is a party to the action and thus, the rules as established by these cases have no bearing upon the instant issue.

RESPECTFULLY SUBMITTED,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

BY /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

ROCAP, ROCAP & REESE

BY /s/ KEITH REESE
Keith Reese

Attorneys for National Lead Company

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was delivered to:

Townsend and Townsend
403 Indiana Building
120 E. Market
Indianapolis, Indiana
Attorneys for the plaintiffs, Markiewicz,

and

Smith and Yarling
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants, The Greyhound Corp and Robert L. Schlagenhauf,

and

Mr. A. L. Payne
Lewis, Weiland, Payne
& Carvey
501 Fidelity Building
Indianapolis 4, Indiana

Sheldon A. Breskow
930 Lemcke Bldg.
Indianapolis 4, Indiana

Attorneys for plaintiff, Charles Jones.

and

mailed to:

[fol. 13] Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund Bldg.
Philadelphia 7, Pa.
Attorney for plaintiffs Markiewicz

this 5th day of February, 1963.

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

[fol. 14]

Exhibit "A" to Exhibit "B"

State of Indiana)
) ss.
County of Marion)

Affidavit of One of Defendant's Counsel

Harry A. Wilson, Jr., being duly sworn on his oath, deposes and says:

(1) That he is a partner in the firm of Armstrong, Gause, Hudson & Kightlinger, authorized and admitted to practice before the United States Federal District Court for the Southern District of Indiana and is one of the attorneys of record for the Defendant, Contract Carriers, Inc. and Joseph L. McCorkhill.

(2) That by his own admission, the defendant, Robert L. Schlagenhauf, in his deposition taken on August 9, 1962, admitted that he saw red lights for 10 to 15 seconds prior to a collision with a semi-tractor trailer unit and yet drove

his vehicle on without reducing speed and without altering the course thereof.

(3) The only eye-witness to this accident known to this affiant, Lewis Stone, testified that immediately prior to the impact between the bus and truck that he had also been approaching the truck from the rear and that he had clearly seen the lights of the truck for a distance of three-quarters to one-half mile to the rear thereof.

(4) The defendant, Robert L. Schlagenhauf, has admitted in his deposition taken on August 9, 1962, that he was involved in a similar type rear end collision while operating a motorbus near Flatrock, Michigan, in which parties were injured prior to the collision with the semi-tractor trailer unit of the defendant, Contract Carriers, Inc.

(5) A physical examination in the four specialty fields, as set out in defendant's Contract Carriers, Inc. and Joseph L. McCorkhill, petition can be performed without pain, suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant and only through such examinations can the true status and condition of the mental and physical condition be ascertained.

(6) The specialties of internal medicine, ophthalmology, neurology and psychiatry require extensive training and are not within the common knowledge of the average layman and thus, without examination by specialist, no one will be able to testify upon this important issue which is in controversy in this case.

Further, Affiant sayeth not.

/s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

SUBSCRIBED and sworn to before me this 5th day of February, 1963.

Margaret Gordon, Notary Public

My commission expires 8-6-66

[fol. 15]

EXHIBIT "C" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

AMENDED COMPLAINT FOR DAMAGES

COUNT I

1. The plaintiff in this Count is JOHN ANTHONY MARKIEWICZ, a minor age 17 suing by his father and next friend, EDWARD MARKIEWICZ.

2. Said plaintiff is a citizen of and resides at 132 Beck Street, Philadelphia, Pennsylvania.

3. The defendant, THE GREYHOUND CORPORATION, is a common carrier of passengers for hire and is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the State of Illinois.

4. The defendant, CONTRACT CARRIERS, INC., is a corporation organized and existing under and by virtue of the

laws of the State of Indiana with its principal place of business in the State of Indiana.

5. The defendant, ROBERT L. SCHLAGENHAUF, is an individual residing at 102 N. Drexel Avenue, Indianapolis, Indi- [fol. 16] ana, and was the driver of the Greyhound G.M.C. motor bus involved in the accident hereinafter described.

6. The defendant, JOSEPH L. MCCORKHILL, is an individual residing at Rural Route 6, Anderson, Indiana, and was the driver of the tractor-trailer unit involved in this accident.

7. The third-party defendant, NATIONAL LEAD COMPANY, is and was at all times herein complained of a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in the State of New York.

8. The matter in controversy herein, exclusive of interest and costs, exceeds the amount of $10,000.00.

9. That U.S. Highway 40 is a paved blacktop public highway laid out in an east-west direction as it passes through the State of Indiana and particularly in Liberty Township of Hendricks County at a point about 1.6 miles west of Belleville.

10. That at said location 1.6 miles west of Belleville said U.S. Highway is so constructed that there are two east-bound traffic lanes passing over a 24-foot roadway which is divided from west-bound traffic by an intervening unimproved grass medial strip approximately 33 feet wide.

11. That said two east-bound lanes at all points herein complained of were divided by clearly painted broken white lines in the middle of said 24-foot roadway.

12. That the Indiana State Highway Commission had determined and sign-posted said location as being under a 65 mile per hour speed limit.

13. That on July 13, 1962 at about 1:05 A.M. and in darkness plaintiff John Anthony Markiewicz and his mother, plaintiff Jennie Markiewicz were paid passengers riding in

said 1957 G.M.C. motor bus owned and operated by defendant The Greyhound Corporation as it proceeded eastward [fol.17] along said U.S. Highway 40.

14. Said bus was driven by defendant Robert L. Schlagenhauf who was the duly constituted and acting employee and agent of The Greyhound Corporation.

15. Proceeding along said U. S. Highway 40 at some distance ahead of said bus was a 1960 G.M.C. tractor towing a Trailmobile trailer loaded with powdered lead and having a gross weight of 71,440 pounds.

16. Said tractor was being driven by defendant Joseph L. McCorkhill and was owned by defendant Contract Carriers, Inc.

17. Joseph L. McCorkhill was the duly constituted and acting agent and employee of defendant Contract Carriers, Inc. as he was driving its tractor along said highway.

18. Said Trailmobile trailer was owned by third-party defendant National Lead Company.

19. At all times herein complained of defendant Contract Carriers, Inc. was the duly constituted and acting agent of third-party defendant National Lead Company towing said trailer in connection with the business of National Lead Company.

20. At all times herein complained of defendant Joseph L. McCorkhill was the agent of defendant National Lead Company and as such was towing said trailer in connection with the business of National Lead Company.

21. That at said location about 1.6 miles west of Belleville and at said time said bus collided with the rear of said trailer causing the bus to be sheared apart and injuring John Anthony Markiewicz and his mother as hereinafter will appear.

22. That at the time of and immediately prior to said collision, defendants The Greyhound Corporation and Robert L. Schlagenhauf were negligent and careless in one or more of the following respects:

[fol. 18] a) Failed to keep a reasonable lookout for other vehicles using the highway in front of them and particularly the tractor-trailer unit which they struck.

b) Drove at a speed which was greater than was reasonable and prudent, taking into consideration the fact that they were driving a large two-story Super Scenicruiser carrying 43 passengers at nighttime and were approaching said tractor-trailer unit, to-wit: 75 miles per hour.

c) Failed to maintain proper control of said bus by reducing the acceleration, applying the brakes and steering same as they overtook said tractor-trailer unit.

d) Failed to restrict their speed as necessary to avoid colliding with said tractor-trailer unit on the highway ahead of them.

e) Drove said bus at a speed greater than the maximum number of miles per hour for said location which had been determined and sign-posted as a speed limit by the Indiana State Highway Commission, to-wit: they drove at 75 miles per hour where the posted limit was 65 miles per hour.

f) Although they were rapidly overtaking said tractor-trailer unit they failed to pass to the left thereof at a safe distance but instead they drove directly into the rear of the trailer.

g) Failed to blow their horn or give any audible signal of their intention to pass said tractor-trailer unit.

23. That at the time of and immediately prior to the collision defendants Contract Carriers, Inc., National Lead Company and Joseph L. McCorkhill were negligent and careless in one or more of the following respects:

a) Operated the tractor-trailer unit at such a low speed as to impede the normal and reasonable movement of traffic, to-wit: 20 miles per hour on said highway having a 65 mile per hour speed limit.

b) Although they operated the tractor-trailer unit at a speed less than the normal speed of traffic at the time and place then existing they nevertheless failed to operate entirely within their righthand lane and as close as practicable to the righthand edge of said roadway but instead they operated with the northernmost part of said trailer in their lefthand lane.

c) They operated said trailer at nighttime without having thereon sufficient and proper clearance lamps on the rear thereof capable of being seen and distinguished under the then normal existing conditions for a distance of 500 feet from the rear so as to show the extreme width of the trailer and so as to clearly demonstrate where the rear end of the trailer was.

[fol. 19] d) They towed said heavy trailer weighing 71,400 pounds loaded with powdered lead along said heavily traveled U. S. highway with a tractor which they knew or in the exercise of reasonable care should have known did not have sufficient capacity or power to tow the trailer at a sufficient speed to avoid impeding the normal flow of traffic.

24. That as a direct result of said collision plaintiff John Anthony Markiewicz suffered the following injuries, losses and damages:

a) Traumatic amputation of right leg below the knee.

b) Further surgical amputation of the right leg above the knee was required.

c) Multiple compound fractures of the pelvis, superior and inferior rami.

d) Bilateral compound fractures of the pubis and ischial bones.

e) Bilateral separation of the sacroiliac joints.

f) Multiple fractures of the spine, with anterior wedging of the 2nd, 3rd, and 4th lumbar vertebrae.

g) Comminuted fracture of the body of the 3rd lumbar vertebra with lumbar scoliosis concabity to the right.

h) Lacerated bladder.

i) Traumatic contusing and tearing of the urethra.

j) Partial avulsion loss of right hemiscrotum.

k) Large lacerating cuts through the muscles and tissues of the medial aspects of both thighs.

l) Severe laceration of perineum.

m) Severe laceration of left hemiscrotum.

n) Severe shock tc his physical and nervous system.

o) Multiple abrasions and bruises on both arms, the neck and chest.

p) He suffered the loss of a great amount of blood and was compelled to receive 17 blood transfusions of 500 cc. each.

q) He had to undergo several surgical exploratory operations including a laparotomy.

r) He was unable to urinate through his penis and [fol. 20] a supra pubic cystotomy catheter had to be inserted directly into his bladder for many days.

s) He was placed on his back with his stump in traction for many days.

t) He suffered much infection and drainage in the large thigh lacerations and the lacerations of the scrotum and perineum.

u) He was placed in a tight body cast and a corset to pull the pelvic fractures together.

v) He was placed in a pelvic sling.

w) He has endured great pain, anxiety and mental anguish.

x) He has been compelled to take many drugs to relieve pain.

y) His ability to work and earn a living and to get an education and to enjoy life in a normal manner has been destroyed.

z) His ability to reproduce and have children probably has been destroyed.

A) His appearance has been ruined and he will never walk normally.

B) He has suffered severe psychic trauma and personality change.

C) He will suffer pain and inconvenience for the rest of his life.

D) He will suffer medical costs and expenses for the rest of his life due to said injuries.

E) His normal life expectancy has been reduced.

25. That all of said injuries, losses and damages to plaintiff John Anthony Markiewicz were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in rhetorical paragraphs 22 and 23 above.

WHEREFORE, plaintiff John Anthony Markiewicz prays for compensatory damages against the defendants and each of them in the sum of One Million ($1,000,000.00) Dollars and exemplary damages against the defendants and third [fol. 21] party defendant and each of them in the sum of Three Hundred Thousand ($300,000.00) Dollars.

COUNT II

The plaintiff Jennie Markiewicz now complains of the defendants and third party defendant and each of them and alleges:

1. She is a citizen of Pennsylvania residing at 132 Beck Street in Philadelphia.

2. She incorporates by reference paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Count I.

24. That plaintiff Jennie Markiewicz suffered the following injuries, losses and damages:

a) Concussion and contusion of the brain.

b) Severe bruising of the head and face with blackening of both eyes.

c) Sprain and strain of the muscles, ligaments and nerves of the neck and back.

d) Fractures of both hips.

e) Severe comminuted compound fractures of the right leg.

f) Severe shock.

g) Bruising of all of her internal organs.

h) Bruising of her left leg.

i) She endured great pain and mental anguish.

j) Her injuries to her head, neck, back, hips and legs are permanent.

k) She will have to lay out reasonable sums in attempting to cure herself in the future.

l) She will lose earnings and earning capacity.

[fol. 22] 25. All of said injuries, losses and damages were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in rhetorical paragraphs 22 and 23.

Wherefore plaintiff Jennie Markiewicz prays for compensatory damages against the defendants and third party defendant and each of them in the sum of Three Hundred Thousand ($300,000.00) and exemplary damages against the defendants and third party defendant and each of them in the sum of Fifty Thousand ($50,000.00) Dollars.

Count III

1. The plaintiff in this count is Edward Markiewicz, the father of John Anthony Markiewicz and the husband of Jennie Markiewicz.

2. Plaintiff is a citizen of Pennsylvania and resides at 132 Beck Street, Philadelphia.

3. By reference he incorporates paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Count I the same as if set forth fully herein.

24. That as a result of the injuries to John A. Markiewicz and Jennie Markiewicz plaintiff Edward Markiewicz has suffered losses and damages in the following respects:

a) He has been compelled to lay out large sums for the treatment and care of said son and wife in the following reasonable amounts:

Hospitals	$15,000.00,
Doctors	$ 5,000.00.

b) He has had to purchase medicines and braces of the reasonable value of $350.00.

c) He has been compelled to pay for transportation to visit them and for airplanes and ambulances to get them to Philadelphia in the reasonable sum of $1,500.00.

d) He will have to pay future reasonable medical and hospital expenses in the sum of $10,000.00 for their care.

[fol. 23] e) He has lost the services and companionship of both of them ever since the accident.

f) He has lost the consortium of his wife.

25. That all of said losses and damages to plaintiff, Edward Markiewicz, were proximately caused by the wantonness, gross negligence and carelessness of the defendants and third party defendant and each of them as set forth in paragraphs 22 and 23.

WHEREFORE, plaintiff Edward Markiewicz prays judgment against the defendants and third party defendant and

each of them in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars and for all other proper relief.

EDMUND PAWELEC

517 Western Saving Fund Bldg.
Broad & Chestnut Streets
Philadelphia, Pennsylvania

TOWNSEND & TOWNSEND

403 Indiana Building
Indianapolis 4, Indiana
ME 7-1537

By /s/ EARL C. TOWNSEND
Attorneys for Plaintiffs

Copies mailed to opposing counsel, Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Building, Indianapolis, Indiana, Smith & Yarling, 13 North Pennsylvania Street, Indianapolis 4, Indiana and Rocap, Rocap & Reese, 156 East Market Street, Indianapolis 4, Indiana this 8th day of November, 1962.

/s/ EARL C. TOWNSEND

[fol. 24]

EXHIBIT "D" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, General Motors Corporation,

Defendants.

AMENDED CROSS-CLAIM

The defendant The Greyhound Corporation, for cross-claim against the defendant Contract Carriers, Inc., the defendant National Lead Company, and the defendant General Motors Corporation, states:

1. The cross claimant, The Greyhound Corporation, is and was at all times mentioned herein a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois, and is and was at all such times the owner of a certain G.M.C. Motor Bus, model 4501, designated Super Scenicruiser.

2. On the 13th day of July, 1962, at about the hour of 1:10 A.M. the cross-defendant Contract Carriers, Inc. by and through its agent and employee Joseph L. McCorkhill was operating its certain G.M.C. tractor towing a Trailmobile trailer owned by the cross-defendant National Lead Company eastward on United States Highway No. 40 in Hendricks County, State of Indiana, at a point about 1.6 miles west of Belleville, Indiana and then and there carelessly and negligently caused the cross-claimant's said G.M.C. Motor Bus to collide with the left rear corner of the said Trailmobile trailer, proximately resulting in damage to the [fol. 25] said bus as hereinafter more particularly described.

3. The said carelessness and negligence of the cross-defendant Contract Carriers, Inc. as acting by and through its said agent and employee consisted of one or more of the following acts and omissions:

(a) Contract Carriers, Inc. operated its tractor at such a low speed as to impede the normal and reasonable movement of traffic and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2006—"No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with the law."

(b) Contract Carriers, Inc. failed to operate its tractor and the trailer towed by it as nearly as practicable entirely within a single lane of the four laned U. S. Highway 40 at the scene of the collision aforesaid but instead operated the said tractor-trailer combination in part in the southermost traffic lane of the said highway and in part in the adjacent lane to the north and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2018—"Whenever any roadway has been divided into three (3) or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

(c) Contract Carriers, Inc. operated the said tractor-trailer combination at a speed less than the normal speed of traffic at the time and place under the conditions then existing and failed to operate the said unit in the right-hand lane then available for traffic or as close as practicable to the right-hand edge of the roadway but instead operated with part of the said trailer in the southermost or right-hand lane of U. S. Highway 40 and part of the adjacent lane to the north thereof and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2010—" . . . S. Upon all roadways any vehicle [fol. 26] proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway."

(d) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although the said trailer was of a tonnage greatly in excess of 3,000 pounds and was not equipped with clearance lights upon the rear thereof and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2208—"In addition to other equipment required in this act, the following vehicles shall be equipped as herein stated under the conditions stated in section 9 (Sec. 47-2207):
>
> . . . (d) 'On every trailer or semi-trailer having a gross weight in excess of 3,000 pounds: . . . On the rear, two (2) clearance lamps, one at each side . . .'"

(e) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although said trailer was not equipped with rear clearance lamps mounted on the permanent structure of the trailer in such a manner as to indicate its extreme width and as near the top of the rear of the said trailer as practicable and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2210—. . . (b) "Clearance lamps shall be mounted on the permanent structure of the vehicle in such a manner as to indicate its extreme width and as near the top thereof as practicable. Clearance lamps and side marker lamps may be mounted in combination provided illumination is given as required herein with reference to both."

(f) Contract Carriers, Inc. towed the said trailer along the highways of the State of Indiana in the nighttime although said trailer was not equipped with rear clearance lamps capable of being seen and distinguished under normal atmospheric conditions at a distance of 500 feet from the rear of the said trailer and thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

[fol. 27] Burns 47-2211—"... (b) Front and rear clearance lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of 500 feet from the front and rear, respectively, of the vehicle."

(g) Contract Carriers, Inc. operated along the highways of the State of Indiana at a slow speed in the nighttime a tractor-trailer combination which constituted a vehicular traffic hazard in that the said trailer was painted gray in color which was difficult to see on the darkened highway, was not equipped with clearance lights on the upper rear part of the trailer providing sufficient illumination to be effectively seen to the rear thereof, was of a skeletal construction which was difficult to distinguish in the dark, and was equipped with three identification lights which were mounted at a position approximately sixteen (16) feet from the rear of the said trailer and which gave the appearance and illusion to traffic approaching from the rear that the rear of the said trailer was at the location of the said identification lights, and the said Contract Carriers, Inc. failed and refused to provide the said trailer, though constituting such traffic hazard, with additional warning lamps on the rear thereof notwithstanding the permission to do so granted by the following statute of the State of Indiana which was then and there in full force and effect:

Burns 47-2218—"... (d) Any vehicle may be equipped with lamps which may be used for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking or passing, and when so equipped may display such warning in addition to any other warning signals required by this act. The lamps used to display such warning to the front shall be mounted at the same level and as widely spaced laterally as practicable, and shall display simultaneously flashing white or amber lights, or any shade of color between white and amber. The lamps used to display such warning to the rear shall be mounted at the same level and as widely spaced laterally as prac-

ticable, and shall show simultaneously flashing amber or red lights, or any shade of color between red and amber. These warning lights shall be visible from a distance of not less than 500 feet under normal atmospheric conditions at night."

(h) Contract Carriers, Inc. towed the said trailer in interstate commerce along the highways of the State of [fol. 28] Indiana in the nighttime although said trailer was more than 80 inches in width and was not equipped on the rear thereof with clearance lamps or rear identification lamps, the said trailer being equipped instead with identification lamps located approximately sixteen (16) feet forward of the rear of the said trailer, and Contract Carriers, Inc. thereby violated the following safety regulation duly ordered by the United States Interstate Commerce Commission which was then and there in full force and effect:

"193.14 Lamps and reflectors, large semitrailers and pole trailers.

Every semitrailer or pole trailer 80 inches or more in overall width, except converter dollies, shall be equipped as follows:

(a) On the front, two clearance lamps, one at each side.

(b) On the rear, two tail lamps, one at each side; two stop lamps, one at each side; two clearance lamps, one at each side; two reflectors, one at each side; three identification lamps, mounted on the vertical center line of the vehicle, provided that the identification lamps need not be lighted if obscured by another vehicle in the same combination."

(i) Contract Carriers, Inc. operated the said tractor-trailer along the highways of the State of Indiana without maintaining a proper lookout for traffic approaching from the rear.

(j) Contract Carriers, Inc. attempted to tow a loaded trailer with a gross weight of approximately thirty-six (36) tons upon the public highways in the nighttime with a tractor which did not have sufficient power to pull the said

trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision.

(k) Contract Carriers, Inc. attempted to tow a loaded trailer with a gross weight of approximately thirty-six (36) tons upon the public highways in the nighttime with a tractor which the said defendant knew was defective in that its accelerator linkage was so placed or designed that the tractor could not be operated with sufficient power to pull the said trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision.

[fol. 29] (l) Contract Carriers, Inc. caused and knowingly permitted to be driven and moved on the said U. S. Highway 40 a vehicle which was in such unsafe condition as to endanger other persons using the said highway and which vehicle was not equipped with lamps in proper condition and adjustment as required by law, and Contract Carriers, Inc. thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2201 "(a) It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain these parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of this article, or for any person to do any act forbidden or fail to perform any act required under this article."

(m) Contract Carriers, Inc. operated the said tractor-trailer along the highways of the State of Indiana at a time when the lighting equipment upon the said trailer and the accelerator linkage equipment upon the said tractor was not in good working order and adjustment and at a time when the said tractor and trailer were not in such safe

mechanical condition so as not to endanger other persons upon the highway, and Contract Carriers, Inc. thereby violated the following statute of the State of Indiana which was then and there in full force and effect:

> Burns 47-2301 "No person shall drive or move on any highway any motor vehicle, trailer, semitrailer or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupants or any person upon the highway."

4. The cross-defendant National Lead Company was concurrently careless and negligent with the cross-defendant Contract Carriers, Inc. in proximately causing the said collision and the resulting damage to the cross-claimant's motor bus in the following particulars:

(a) National Lead Company was guilty of each of the acts and omissions set forth in rhetorical paragraph 3 above as charged against Contract Carriers, Inc. in that at all times mentioned herein the said Contract Carriers, [fol. 30] Inc. was acting as the agent of the said National Lead Company within the scope of the said agency.

(b) National Lead Company was careless and negligent in that the trailer being towed by Contract Carriers, Inc. constituted a dangerous article or agency when used upon the public highways in the nighttime for the reason that the said trailer was not equipped with proper clearance and identification lights and was so constructed that it was difficult to see by overtaking traffic in the nighttime because of its color and unusual skeletal construction and for the further reason that it was too heavy as loaded with lead to be pulled by the Contract Carriers, Inc. tractor at a sufficient speed to avoid impeding the normal and reasonable movement of traffic upon a four lane, divided, United States Highway, but National Lead Company as owner and bailer of the said trailer bailed and entrusted the said trailer to Contract Carriers, Inc. knowing of the aforesaid dangerous

conditions and knowing that the said trailer would be towed upon the public highways in such a manner as to endanger persons and property.

(c) National Lead Company furnished and bailed to Contract Carriers, Inc. a trailer which was not sufficiently equipped with rear lights to meet lawful standards as established by the State of Indiana and the Interstate Commerce Commission although the said National Lead Company knew or reasonably should have known that the said trailer would be operated in interstate commerce and over the highways of the State of Indiana in the nighttime.

5. The cross-defendant General Motors Corporation was also concurrently careless and negligent with the cross-defendant Contract Carriers, Inc. in proximately causing the said collision and the resulting damage to the cross-claimant's motor bus in the following particulars:

(a) General Motors Corporation was guilty of each of the acts and omissions set forth in rhetorical paragraph 4 above as charged against Contract Carriers, Inc. in that at all times mentioned herein the said Contract Carriers, Inc. was acting in the employ and as the agent of the said Gen- [fol. 31] eral Motors Corporation within the scope of the said agency.

(b) General Motors Corporation was careless and negligent in that the trailer being towed by Contract Carriers, Inc. constituted a dangerous article or agency when used upon the public highways in the nighttime for the reason that the said trailer was not equipped with proper clearance and identification lights and was so constructed that it was difficult to see by overtaking traffic in the nighttime because of its color and unusual skeletal construction and for the further reason that it was too heavy as loaded with lead to be pulled by the Contract Carriers, Inc. tractor at a sufficient speed to avoid impeding the normal and reasonable movement of traffic upon a four lane, divided, United States highway, but General Motors Corporation as bailer of the said trailer together with the defendant National Lead Company, bailed and entrusted the said trailer to Contract Carriers, Inc. knowing of the aforesaid dangerous condi-

tions and knowing that the said trailer would be towed upon the public highways in such a manner as to endanger persons and property.

(c) General Motors Corporation was further careless and negligent in the construction and design of the accelerator linkage equipment of the said tractor which was being operated by the cross-defendant Contract Carriers, Inc., which said tractor was manufactured by the said cross-defendant General Motors Corporation, and the said defective design of the said accelerator linkage equipment prevented the towing of the said National Lead Company trailer at a speed sufficient to avoid impeding the normal and reasonable movement of traffic upon United States Highway 40 at and near the scene of the said collision even though the said tractor engine otherwise had sufficient power to properly tow the said trailer.

6. By reason of the carelessness and negligence of Contract Carriers, Inc., National Lead Company, and General Motors Corporation as aforesaid as proximately causing the said collision, the motor bus owned by The Greyhound Corporation was damaged to the extent that the entire right front part of the said bus was destroyed and the frame thereof twisted and bent; that the reasonable value of the [fol. 32] said bus before the said collision was approximately Fifty Thousand Dollars ($50,000.00) but after the said collision was only approximately Twenty Thousand Dollars ($20,000.00) and that in addition to the said damage to the said bus, the cross-claimant has lost the use of the said bus, which said loss of use is continuing during the time necessary for repairs to be made.

Wherefore, the cross-claimant The Greyhound Corporation prays:

(1) That the Court order General Motors Corporation to be made a party defendant to respond to the foregoing amended cross-claim.

(2) That this cross-claimant have judgment upon this cross-claim against Contract Carriers, Inc., National Lead Company, and General Motors Corporation either individually or jointly in the amount of Thirty-Six Thousand

Dollars ($36,000.00) and costs, and cross-claimant further prays for all other proper relief.

SMITH & YARLING

BY /s/ RICHARD W. YARLING
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for Defendant
The Greyhound Corporation

[fol. 33]

EXHIBIT "E" TO PETITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

ANSWER OF DEFENDANTS, CONTRACT CARRIERS, INC. and JOSEPH L. MCCORKHILL, TO DEFENDANT, THE GREYHOUND CORPORATION'S CROSS-CLAIM

FIRST DEFENSE

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their first defense to defen-

dant, The Greyhound Corporation's cross-claim, allege and say:

I.

That they are without information sufficient to form a belief as to the truth of the averments in rhetorical paragraphs (1), (3) and (4) of defendant, The Greyhound Corporation's cross-claim and therefore deny the same.

II.

That they admit the allegations in rhetorical paragraph (2).

[fol. 34]

III.

That they deny rhetorical paragraph (5) of the defendant, The Greyhound Corporation's cross-claim, except that they admit that on the 13th day of July, 1962, at approximately 1:10 A.M., the defendant, Joseph M. McCorkhill, was driving a certain GMC tractor and trailing a Trailmobile trailer, owned by National Lead Company, eastward on U. S. Highway 40 in Hendrix County, State of Indiana, in the right hand or southernmost lane of U. S. Highway 40, with the northernmost part of said vehicle approximately two feet five inches south of the center line of the two eastbound traffic lanes.

IV.

That they deny rhetorical paragraphs (6), (7) and (8) and more specifically deny sub-paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) of rhetorical paragraph (6) and more specifically deny sub-paragraphs (a), (b) and (c) of rhetorical paragraph (7).

V.

That as to any material averments of the defendant, The Greyhound Corporation's complaint not heretofore ad-

mitted or denied, these defendants now specifically deny each and every such material averment.

WHEREFORE, these defendants pray that the defendant, The Greyhound Corporation, take nothing by way of its cross-claim and these defendants have their costs herein and all other just and proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....

Harry A. Wilson, Jr.

SECOND DEFENSE.

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their second defense to defen- [fol. 35] dant, The Greyhound Corporation's cross-claim, allege and say:

I.

That the negligence of the driver of the defendant, The Greyhound Corporation's bus proximately caused and contributed to the defendant, Greyhound's damages.

WHEREFORE, the defendants pray that the defendant, The Greyhound Corporation, take nothing by way of its complaint.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....

Harry A. Wilson, Jr.

THIRD DEFENSE

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, and for their third defense to the Defendant, The Greyhounds' cross-complaint, allege and say:

I.

That Robert L. Schlagenhauf, driver of the defendant Greyhound's bus, was guilty of wanton and wilful negli-

gence, which was the proximate cause of the defendant, Greyhound's damages.

WHEREFORE, these defendants pray that the defendant, Greyhound, take nothing by way of its cross-claim and these defendants be awarded judgment for their costs and all other just and proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By .....
Harry A. Wilson, Jr.

[fol. 36]

CERTIFICATE OF SERVICE

The undersigned, Attorney for defendants, Joseph L. McCorkhill and Contract Carriers, Inc., hereby certifies that a copy of the foregoing Answer was served upon Townsend & Townsend, 403 Indiana Bldg., Indianapolis 4, Ind., Edmund Pawelec, 517 Western Saving Fund Bldg., Bread & Chestnut Streets, Philadelphia, Pa., Smith & Yarling, 129 E. Market St., Indianapolis, Ind. and Rocap, Rocap & Reese, 156 E. Market Street, Indianapolis, Ind., by depositing in the United States mail, this 13th day of November, 1962.

.....
Harry A. Wilson, Jr.

ARMSTRONG, GAUSE, HUDSON &
KIGHTLINGER
426 Fidelity Bldg
111 Monument Circle
Indianapolis, Indiana
Phone: Melrose 8-5521

[fol. 37]

EXHIBIT "F" TO PETITION

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER
SIXTH FLOOR FIDELITY BUILDING
111 MONUMENT CIRCLE
INDIANAPOLIS 4

COPY

MElrose 8-5521

January 21, 1963.

Hon. Cale J. Holder
United States District Court
Federal Building
Indianapolis, Indiana

Re: No. IP 62-C-285
John Anthony Markiewicz, et al
vs. The Greyhound Corporation, et al
Our File No. 2315

Dear Judge Holder:

At the pre-trial conference of January 8, 1963, the Court ordered the defendant, Contract Carriers, Inc., to consolidate its Second and Third Defenses of Answer to the Cross-complaint of The Greyhound Corporation. Rather than consolidate the Third Defense with the Second Defense, Contract Carriers, Inc. will abandon its Third Defense to said Cross-complaint.

The Second Defense of Contract Carriers, Inc. to the Cross-complaint of The Greyhound Corporation is to the effect that the negligence of the driver of the bus of the defendant, The Greyhound Corporation, proximately caused and contributed to the damages of the defendant, The Greyhound Corporation, and to this Contract Carriers, Inc. adds the following, to-wit:

"That the negligence of The Greyhound Corporation proximately caused and contributed to the damages it alleges in its Cross-complaint."

"The contributory negligence of The Greyhound Corporation and its driver, Robert L. Schlagenhauf, consists of all

the careless and negligent acts as set forth in rhetorical paragraph 22 a, b, c, d, e, f, g, h, i, and j of the Amended Complaint of the plaintiff, John Anthony Markiewicz. Defendant, Contract Carriers, Inc. adopts the statements contained in the letter of January 16, 1963 of counsel for said John Anthony Markiewicz as to which of said allegations of said plaintiffs' Amended Complaint relate to violations of statutory duties and which relate to violation of [fol. 38] common law duties by the defendants, The Greyhound Corporation and Robert L. Schlagenhauf.

In addition to the charges of carelessness and negligence made in the Amended Complaint of John Anthony Markiewicz against The Greyhound Corporation and its driver, Robert L. Schlagenhauf, the defendant, Contract Carriers, Inc., in further support of its Second Defense to said Cross-complaint charge and allege that the defendant, The Greyhound Corporation was careless and negligent at the time and place in question, in that:

"1. The Greyhound Corporation carelessly and negligently failed to provide, install and maintain upon or about said bus windshield washers or other cleaning equipment which was adequate to properly clean the windshield of said bus.

"2. The Greyhound Corporation carelessly and negligently required its driver, Robert L. Schlagenhauf, to meet or make a bus schedule which schedule required that said bus driver operate said Greyhound bus at a high, dangerous and reckless rate of speed and in a reckless and dangerous manner in order to make or meet the schedule set up and provided by The Greyhound Corporation for its said driver.

"3. The defendant, The Greyhound Corporation, carelessly and negligently operated, maintained and used a bus upon the public highways which did not have sufficient structural members or adequate strength built into said bus and, in particular, built into the right front of said bus to prevent said bus from crumbling and tearing asunder when said bus struck or hit a solid object, although The Greyhound Corporation well knew that said bus would be

operated over busy and crowded public highways at high rates of speed and was likely to come into contact with solid objects.

"4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation."

The above four acts or omissions of carelessness and [fol. 39] negligence to sustain the Second Defense of the defendant, Contract Carriers, Inc., to the Cross-complaint of The Greyhound Corporation, are based upon common law negligence.

Very truly yours,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER,
/s/ ARIBERT L. YOUNG
by Aribert L. Young.

ALY:LH

cc: Townsend & Townsend, Attorneys
120 East Market Street, Indianapolis 4

Smith & Yarling
1313 First Federal Building, Indianapolis 4

Rocap, Rocap, & Reese, Attorneys
156 East Market Street, Indianapolis 4

Edward J. Erpelding, Attorney
120 East Market Street, Room 433, Indianapolis 4

[fol. 40]

In United States Court of Appeals

For the Seventh Circuit

Before

Hon. John S. Hastings, Chief Judge, Hon. Luther M. Swygert, Circuit Judge.

Original Petition for Writ of Mandamus.

No. 14403

Robert L. Schlagenhauf, Petitioner,

vs.

Hon. Cale J. Holder, United States District Judge for the Southern District of Indiana, Respondent.

Rule to Show Cause—March 19, 1963.

This matter comes before the Court on the petition of Robert L. Schlagenhauf, filed herein on March 13, 1963, for a writ of mandamus directed to the respondent, Hon. Cale J. Holder, United States District Judge, commanding him to vacate an order entered by him on February 21, 1963, for the physical and mental examinations of Robert L. Schlagenhauf; that a Rule that respondent show cause be issued; and for other relief.

On consideration whereof, It Is Ordered by the Court that respondent, Hon. Cale J. Holder, United States District Judge for the Southern District of Indiana show cause, if any there be, why a writ of mandamus should not issue as prayed for in said petition by filing in the office of the Clerk of this Court an original and nine (9) copies of his response to this Rule within twenty (20) days from this date, such response to be confined to the question of his authority to enter such an order against petitioner under Rule 35, F.R.C.P.

It Is Further Ordered by the Court that in the meantime and pending the final disposition of the said petition for

writ of mandamus by this Court, the respondent be and he hereby is stayed from enforcing compliance with his order of February 21, 1963, for the physical and mental examinations of the petitioner, Robert L. Schlagenhauf.

[fol. 41] It Is Further Ordered that the Clerk of this Court shall forthwith serve a copy of the petition, brief in support, and this order upon the respondent, Hon. Cale J. Holder, which service shall be deemed good and sufficient service thereof.

[fol. 43]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14103

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

ANSWER OF THE RESPONDENT, THE HONORABLE CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, SOUTHERN DISTRICT OF INDIANA—Filed April 27, 1963

(Omitted in printing)

[fol. 49]

RESPONDENT'S EXHIBIT "1" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Jan. 24, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

vs.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY,

Defendants.

ANSWER OF DEFENDANTS, CONTRACT CARRIERS, INC. AND JOSEPH L. MCCORKHILL, TO AMENDED COMPLAINT

The defendants, CONTRACT CARRIERS, INC. and JOSEPH L. MCCORKHILL, for Answer to the Amended Complaint for Damages of the plaintiffs, John Anthony Markiewicz, a minor by his father and next friend, Edward Markiewicz, and Edward Markiewicz and Jennie Markiewicz, in their own right, allege and say:

[1] These defendants admit the facts stated in rhetorical paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 22 and 22(a), 22(b), 22(c), 22(d), 22(e), 22(f), 22(g), 22(h), 22(i) and 22(j) of Counts I, II and III of the plaintiffs' Amended Complaint.

[2] These defendants deny the allegations contained in rhetorical paragraphs 19, 20, 23, 23(a), 23(b), 23(c), 23(d), 23(e) and 23(f), and 25 of Counts I, II and III of plaintiffs' Amended Complaint.

[fol. 50] [3] These defendants are without knowledge or sufficient information to form a belief as to the truth of the allegations contained in rhetorical paragraphs 13, 21 and 24 and all of the each and separate subparagraphs contained in rhetorical paragraph 24 of Counts I, II and III of plaintiffs' Amended Complaint, except that these defendants do admit that the plaintiff, John Anthony Markiewicz, a minor, and the plaintiff, Jennie Markiewicz, did receive personal injuries as a result of said accident of July 13, 1962, and further that the plaintiff, Edward Markiewicz, did suffer losses and damages for medical and hospital expenses that he incurred for his son, John Anthony Markiewicz, and for his wife, Jennie Markiewicz, as a consequence of said accident of July 13, 1962.

WHEREFORE, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, pray that there be a verdict and finding herein in favor of these defendants, and for all other proper relief in the premises.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER,

by /s/ ARIBERT L. YOUNG
Aribert L. Young
Attorneys for the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill.

Sixth Floor-Fidelity Building
Indianapolis 4
MElrose 8-5521

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was mailed to

[fol. 51]

Townsend and Townsend
Attorneys for the plaintiffs
403 Indiana Building
120 East Market Street
Indianapolis 4

and

Smith and Yarling
Attorneys for defendants, The Greyhound Corporation and Robert L. Schlagenhauf
1313 First Federal Building
Indianapolis 4

and

Rocap, Rocap & Reese
Attorneys for defendant, National Lead Company
156 East Market Street
Indianapolis 4

this 21 day of January, 1 9 6 3.

/s/ Aribert L. Young
Aribert L. Young.

[fol. 52]

RESPONDENT'S EXHIBIT "2" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Feb. 5, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

[Stamp—Received Feb. 6, 1963—Armstrong, Gause, Hudson & Kightlinger]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ in their own right,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, and CONTRACT CARRIERS, INC.,

Defendants,

and

NATIONAL LEAD COMPANY,

Third Party Defendant.

ANSWER OF DEFENDANT, NATIONAL LEAD COMPANY

The defendant, National Lead Company, for answer to Plaintiffs' Amended Complaint says:

1) This defendant is without knowledge or information sufficient to admit or deny the allegations contained in Rhetorical Paragraphs 1 and 2 of Count I; and Rhetorical Paragraph 1 of Count II, and Rhetorical Paragraphs 1 and 2 of Count III.

2) This defendant admits the allegations contained in Rhetorical Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18 and 22, including sub-paragraphs a, b, c, d, e, f and g thereof, of Counts I, II and III of the Plaintiffs' Amended Complaint.

3) This defendant denies the allegations contained in Rhetorical Paragraphs 19, 20, 23, including sub-paragraphs a, b, c and d thereof, and Rhetorical Paragraph 25 of Counts I, II and III of Plaintiffs' Amended Complaint.

4) This defendant is without knowledge or sufficient information to form a belief as to the truth of allegations contained in Rhetorical Paragraphs 13, 21 and 24, including each separate sub-paragraph of Paragraph 24, of Counts I, II and III of Plaintiffs' Amended Complaint, ex- [fol. 53] cept that this defendant does admit that the plaintiffs, John Anthony Markiewicz and Jennie Markiewicz did receive personal injuries as a result of said accident, and that the plaintiff, Edward Markiewicz suffered loss for medical and hospital expenses that he incurred for his son, John Anthony Markiewicz, and for his wife, Jennie Markiewicz.

WHEREFORE, the defendant, National Lead Company, prays that there be a verdict and finding in its favor, and for all necessary and proper relief in the premises.

ROCAP, ROCAP, REESE & ROBB

By /s/ KEITH C. REESE
Attorneys for Defendant,
National Lead Company

156 East Market Street
Indianapolis, Indiana
MElrose 8-7547

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendant, National Lead Company, hereby certifies that a copy of the above Answer was sent United States Mail this 5th day of February 1963 to the following attorneys of record for the parties herein:

Townsend & Townsend
120 E. Market Street—
Room 403
Indianapolis, Indiana
Attorneys for Plaintiffs

Armstrong, Gause, Hudson
& Kightlinger
626 Fidelity Bldg.
Indianapolis 4, Indiana
Attorneys for Defendants,
Contract Carriers, Inc. and
Joseph L. McCorkhill

Smith & Yarling
1313 First Federal Bldg.
13 N. Pennsylvania Street
Indianapolis 4, Indiana
Attorneys for Defendants,
The Greyhound Corporation
and Robert L. Schlagenhauf

Mr. A. L. Payne
Lewis, Weiland, Payne &
Carvey
501 Fidelity Bldg.
Indianapolis 4, Indiana

/s/ KEITH C. REESE
Keith C. Reese

[fol. 54]

RESPONDENT'S EXHIBIT "3" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Feb. 15, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION
No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ,

Plaintiffs,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC. and NATIONAL LEAD COMPANY,

Defendants.

ANSWER OF THIRD PARTY DEFENDANT, NATIONAL LEAD CO., TO DEFENDANT GREYHOUND CORPORATION'S CROSS-CLAIM AND CROSS-CLAIM AGAINST THE GREYHOUND CORPORATION

I

ANSWER

First Defense

The third party defendant, National Lead Co., for its first defense to defendant, Greyhound Corporation's amended cross-claim says:

1. That it admits the allegations contained in rhetorical paragraph (1).

2. It denies the allegations in rhetorical paragraph (2) of the Greyhound Corporation's amended cross-claim except that it admits that on the 13th day of July, 1962, about the hour of 1:10 A.M., the cross-defendant, Contract Carriers, Inc., by and through its agent and employee Joseph L. Mc-

[fol. 55] Corkhill, was operating its certain GMC tractor towing a trail-mobile trailer owned by National Lead Co. eastward on US Highway #40 in Hendricks County, State of Indiana at a point about 1.6 miles west of Belleville, Indiana.

3. It denies the allegations contained in rhetorical paragraph (3) and sub-paragraphs (a) through (m) thereof; rhetorical paragraph (4) and sub-paragraphs (a) through (c) thereof; and rhetorical paragraph (6) of the defendant Greyhound Corporation's amended cross-claim.

4. It denies the allegations contained in rhetorical paragraph (5) and sub-paragraphs (a) through (c) thereof; except it admits that portion of sub-paragraph (a) of said rhetorical paragraph (5) which alleges that at all times mentioned herein the said Contract Carriers Inc. was acting in the employ and as the agent of the said General Motors Corporation within the scope of the said agency.

Wherefore, the third party defendant National Lead Co. prays that the defendant The Greyhound Corporation, take nothing by its amended cross-claim, and for all other relief necessary and proper in the premises.

Boyle, Priest, Elliott & Weakly

Rocap, Rocap, Reese & Robb

By .....

Attorneys for National Lead Co.

II

Second Defense

The third party defendant National Lead Co. for its second defense to defendant The Greyhound Corporation's [fol. 56] amended cross-claim says:

1. That the negligence of the driver of the defendant Greyhound Corporation's bus, the defendant Robert L. Schlagenhaut, and the defendant The Greyhound Corporation proximately caused and contributed to the damages, if any, sustained by the defendant The Greyhound Corporation.

WHEREFORE, the third party defendant National Lead Co. prays that the defendant The Greyhound Corporation, take nothing by its amended cross-claim and for all other relief necessary and proper in the premises.

BOYLE, PRIEST, ELLIOTT & WEAKLY

ROCAP, ROCAP, REESE & ROBB

By .....

Attorneys for National Lead Co.

III

CROSS-CLAIM

The third party defendant, National Lead Co. for its cross-claim against the defendant The Greyhound Corporation and Robert L. Schlagenhauf, alleges and says:

1. The cross-claimant National Lead Co. is and was at all times mentioned herein a corporation organized and existing under the laws of the state of New Jersey, with its principal place of business in the state of New York, and is and was at all such times the owner of a certain trailer known as a "Model 400 PT trail-mobile".

2. On or about July 13, 1962 said trailer was being pulled or towed behind a GMC tractor, said tractor being owned [fol. 57] by the cross-defendant Contract Carriers, Inc., and being driven for and on behalf of said Contract Carriers, Inc. by its agent, servant, and employee Joseph L. McCorkhill in an easterly direction on US Highway #40 in Hendricks County, state of Indiana. As said trailer was being so towed eastwardly and at a point on said highway about 1 and ½ miles west of Belleville, Indiana, A GMC motor bus, Model 4501, owned by the defendant The Greyhound Corporation, and being driven also eastwardly over and upon said highway US #40 by Robert L. Schlagenhauf, the agent, servant, and employee of the said Greyhound Corporation, carelessly and negligently drove said bus into the left rear and side of said trailer, damaging said trailer as hereinafter more particularly described and set out.

3. That the defendant The Greyhound Corporation acting by and through its said agent, servant, and employee and its said employee Robert L. Schlagenhauf, were guilty of carelessness and negligence in one or more of the following particulars:

(1) The Greyhound Corporation bus was operated at such a high rate of speed that the driver thereof could not stop or swerve said bus and so avoid colliding with said trailer, to wit 75 miles per hour.

(2) By failing and neglecting to see and observe the properly and well-lighted trailer which was lawfully being operated along and upon said public highway in the southern most traffic lane of said highway, in front of said bus.

(3) Failing to stop, swerve, or otherwise control said bus so as to avoid colliding with said trailer which was being properly operated along and upon said highway.

(4) By operating said bus along and upon said highway with a windshield covered with bugs, dirt, and debree which impaired the vision of the driver of said bus.

[fol. 58] (5) By failing to allow the necessary and proper distance to exist between the front of said bus and rear of said trailer at the time said bus was attempting to pass said trailer.

(6) By failing to sound a horn or give other audible signal of its intention to pass said trailer.

(7) By operating said bus over and along said public highway when the driver thereof was tired, sleepy, and for these reasons unable to safely control and operate said bus.

(8) By permitting said bus to be operated over and upon said public highway by the said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was impaired and deficient.

(9) By failing to keep a safe distance between the front of said bus and rear of said trailer as both were being driven east along and upon said highway.

4. By reason of and as the direct proximate cause of the aforesaid carelessness and negligence of the defendants The Greyhound Corporation and Robert L. Schlagenhauf, the trailer owned by National Lead Co. was damaged; that the reasonable value of said trailer immediately prior to said collision was approximately Thirty-five Thousand Dollars ($35,000.00) and that the reasonable value of said trailer immediately following said collision was Thirty-three Thousand Dollars ($33,000.00); that in addition to the said damages to said trailer, the National Lead Co. lost the use of said trailer during the time necessary for repairs to be made to the trailer, to its damage in the sum of One Thousand Dollars ($1,000.00).

[fol. 59] WHEREFORE, National Lead Co. prays for damages against the Greyhound Corporation and Robert L. Schlagenhauf in the amount of Three Thousand Dollars ($3,000.00), costs herein expended and for all other necessary and proper relief in the premises.

BOYLE, PRIEST, ELLIOTT & WEAKLY

ROCAP, ROCAP, REESE & ROBB

By /s/ KEITH C. REESE
Attorneys for National Lead Co.

ROCAP, ROCAP, REESE & ROBB
156 East Market Street
Indianapolis, Indiana

BOYLE, PRIEST, ELLIOTT & WEAKLY
705 Olive Street
Suite 1400
St. Louis 1, Missouri

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendant, National Lead Company, hereby certifies that a copy of the above Answer and Cross-Claim was sent United States Mail this 14th day of February 1963, to the following attorneys of record for the parties herein:

TOWNSEND & TOWNSEND
120 East Market Street
Room 403
Indianapolis, Indiana
Attorneys for Plaintiff

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER
626 Fidelity Building
Indianapolis 4, Indiana
Attorneys for Defendants, Contract Carriers Inc. and Joseph L. McCorkhill

SMITH & YARLING
1313 First Federal Building
13 Pennsylvania Street
Indianapolis 4, Indiana
Attorneys for Defendants, The Greyhound Corporation and Robert I. Schlagenhauf

Mr. A. L. Payne
LEWIS, WEILAND, PAYNE & CARVEY
501 Fidelity Building
Indianapolis 4, Indiana

/s/ KEITH C. REESE
Keith C. Reese

[fol. 60]

RESPONDENT'S EXHIBIT "4" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Mar. 14, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs.—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. MCCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, GENERAL MOTORS CORPORATION, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

Come now the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill and under the provisions of Rule 35 and Rule 37 of the Rules of Civil Procedure, now respectfully petition the court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by competent, qualified specialists in each of the following fields:

(1) Internal medicine; (2) Opthalmology; (3) Neurology: (4) Psychiatry.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy. Defendant, Robert L. Schlagenhauf is a named party defendant to the original complaint filed by the plaintiffs. Further, the defendant is a named party with regard to the cross-claim filed by the defendant, National Lead Company. The physical

and mental condition of the defendant, Robert L. Schlagenhauf, is further in controversy, being raised by the general answer of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the plaintiffs' complaint. As [fol. 61] a part of their general answer to the plaintiffs' complaint, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have the right under the pleadings to show that the plaintiffs' damages were the sole, proximate result of the negligence of the defendant, Robert L. Schlagenhauf, in that he was not in proper physical or mental condition to operate a motorbus. Under the general denial filed by the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, to the plaintiffs' complaint, these defendants also have the right to show that the negligence of the Greyhound Corporation in allowing the defendant Schlagenhauf to operate a motorbus when he was not in proper physical or mental condition was the sole, proximate cause of the plaintiff's injuries and damages. Under either of the latter mentioned defenses the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have placed in issue the physical and mental condition of the defendant Schlagenhauf.

Further, the physical and mental condition of the defendant, Robert L. Schlagenhauf, is specifically raised by a charge of negligence in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill to the cross-claim of the defendant, Greyhound Corporation. The defendant, Greyhound Corporation, has asked for the property damage done to its bus. Under the answers filed, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, have a right to show that the negligence of the defendant, Greyhound Corporation, in allowing a driver who was physically and mentally incapable of operating a motorbus was the sole, proximate cause of the damages of the defendant, Greyhound Corporation.

The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent experts, no one of which can examine the defen-

dant Schlagenhauf respective to all of the conditions which relate to his driving ability. These defendants respectfully request that physicians in each of the above listed catagories be appointed and in this regard would respectfully show to the court that there are competent, qualified individuals in the respective fields as follows:
[fol. 62]

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

These examinations can be performed without physical or mental suffering or embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Further reason for a physical and mental examination of the defendant Schlagenhauf is shown by Exhibit "A", an affidavit of one of defendant Contract Carriers, Inc. and

Joseph L. McCorkhill's attorneys involving the following issues:

(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

(2) The lights of the tractor trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of the said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

Without examinations by competent, qualified physicians in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense. [fol. 63] These defendants further request that the court require this examination to be performed on or before the 1st day of May, 1963, in accordance with the pre-trial entry concerning discovery previously entered in this matter. The defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, make this further petition to clarify their petition filed on February 5, 1963, as additional issues and controversies involving the defendant, Robert L. Schlagenhauf, have been raised by the defendant, National Lead Company's cross-claim and by the issues raised in the general denial of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill to the plaintiffs' complaint, which allowed the introduction of evidence as to the sole, proximate cause of the accident.

Wherefore, the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, respectfully pray that this court issue an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by qualified specialists in the fields of internal medicine, opthalmology, neurology

and psychiatry, at a time convenient for the physicians and the defendant, Robert L. Schlagenhauf.

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

CLERK'S NOTE

"Brief in support of petition for physical and mental examination" is omitted from the record here as it appears on side folio 10, printed page 10 supra.

[fol. 65]

Respectfully submitted,

ARMSTRONG, GAUSE, HUDSON & KIGHTLINGER

By /s/ HARRY A. WILSON, JR.
Harry A. Wilson, Jr.

Attorneys for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys of record for defendants, Contract Carriers, Inc. and Jossph L. McCorkhill, hereby certifies that a copy of the foregoing petition and brief in support thereof was served upon the following attorneys by depositing in the United States mail this 14th day of March, 1963.

Townsend and Townsend
403 Indiana Building,
120 E. Market
Indianapolis, Indiana
Attorneys for the plaintiffs
Markiewicz

and Smith and Yarling,
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants,
The Greyhound Corp. and
Robert L. Schlagenhauf

Mr. A. L. Payne
Lewis, Weiland, Payne & Carvey
501 Fidelity Building
Indianapolis 4, Indiana

and Sheldon A. Breskow
930 Lemcke Bldg.
Indianapolis 4, Indiana

Attorneys for plaintiff, Charles Jones

Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund Bldg.
Philadelphia 7, Pa.
Attorney for plaintiffs Markiewicz

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

Armstrong, Gause, Hudson & Kightlinger
626 Fidelity Building
111 Monument Circle
Indianapolis, Indiana
Phone: Melrose 8-5521

[fol. 66]

Exhibit "A" to Exhibit "4"

State of Indiana,
County of Marion, ss.:

Affidavit of One of Defendant's Counsel

Harry A. Wilson, Jr., being duly sworn on his oath, deposes and says:

(1) That he is a partner in the firm of Armstrong, Gause, Hudson & Kightlinger, authorized and admitted to practice before the United States Federal District Court for the Southern District of Indiana and is one of the attorneys of record for the Defendants, Contract Carriers, Inc. and Joseph L. McCorkhill.

(2) That by his own admission, the defendant, Robert L. Schlagenhauf, in his deposition taken on August 9, 1962, admitted that he saw red lights for 10 to 15 seconds prior

to a collision with a semi-tractor trailer unit and yet drove his vehicle on without reducing speed and without altering the course thereof.

(3) The only eye-witness to this accident known to this affiant, Lewis Stone, testified that immediately prior to the impact between the bus and truck that he had also been approaching the truck from the rear and that he had clearly seen the lights of the truck for a distance of three-quarters to one-half mile to the rear thereof.

(4) The defendant, Robert L. Schlagenhauf, has admitted in his deposition taken on August 9, 1962, that he was involved in a similar type rear end collision while operating a motorbus near Flatrock, Michigan; in which parties were injured prior to the collision with the semi-tractor trailer unit of the defendant, Contract Carriers, Inc.

(5) A physical examination in the four specialty fields, as set out in defendant's Contract Carriers, Inc. and Joseph L. McCorkhill, petition can be performed without pain, suffering or mental embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant and only through such examinations can the true status and condition of the mental and physical condition be ascertained.

(6) The specialties of internal medicine, opthalmology, neurology and psychiatry require extensive training and are not within the common knowledge of the average layman and thus, without examination by specialists, no one will be able to testify upon this important issue which is in controversy in this case.

Further Affiant sayeth not.

/s/ Harry A. Wilson, Jr.
Harry A. Wilson, Jr.

Subscribed and sworn to
before me this 14 day of
March, 1963.

/s/ Margaret Gordon, Notary Public
My commission expires 8-6-66.

[fol. 67]

RESPONDENT'S EXHIBIT "5" TO ANSWER

[Stamp—Received Mar. 19, 1964—Armstrong, Gause, Hudson & Kightlinger]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., NATIONAL LEAD COMPANY and GENERAL MOTORS CORPORATION, Defendants.

ENTRY FOR 15 MARCH, 1963

Honorable Carl J. Holder, Judge

This cause came before the court upon the supplemental petition of the defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the pervue of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is:

ORDERED, that the defendant, Robert L. Schlagenhauf, hereby submit to physical and mental examinations by the following physicians:

[fol. 68]

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt.

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding.

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders.

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster.

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of May, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the court will then establish a time certain for the taking of said examinations.

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg., 111 Monument Circle, Indianapolis, Ind.;

Rocap, Rocap & Reese, 156 E. Market, Indianapolis, Ind.;

Townsend & Townsend, 120 E. Market, Indianapolis, Ind.

A. L. Payne, 501 Fidelity Bldg., Indianapolis, Ind.

Smith & Yarling, 1313 First Federal Bldg., Indianapolis, Ind.

Sheldon A. Broskow, 980 Lemcke Bldg., Indianapolis, Ind.

Edmund Pawelec, 517 Western Savings Fund Bldg., Philadelphia, 7, Pa.

[fol. 69]

RESPONDENT'S EXHIBIT "6" TO ANSWER

[Stamp—Filed—U. S. District Court, Indianapolis Division—Mar. 14, 1963—Southern District of Indiana—Robert G. Newbold, Clerk]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

vs.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

PETITION FOR PHYSICAL EXAMINATION OF DEFENDANT, ROBERT L. SCHLAGENHAUF

The defendant, National Lead Company, under the provisions of Rule 35 of the Rules of Civil Procedure, respectfully petitions the Court for an order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical ex-

amination by a competent, qualified specialist in the following fields:

(1) Opthalmology (2) Neurology

(3) Psychiatry (4) Internal Medicine

The physical and mental condition of the said defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action between said Robert L. Schlagenhauf, and this defendant, National Lead Company. The National Lead Company has heretofore, in this cause, filed its cross-claim against the Greyhound Corporation, and the defendant, Robert L. Schlagenhauf. Said cross-claim puts in issue and [fol. 70] alleges that said Robert L. Schlagenhauf failed to see and observe a properly and well lighted trailer owned by National Lead Company which was traveling upon a public highway directly in front of a bus driven by Robert L. Schlagenhauf. The physical and mental condition of the defendant, Robert L. Schlagenhauf, can only be determined by competent and medical experts, no one of which can examine the defendant Schlagenhauf in respect to all of the conditions which relate to his driving ability.

This defendant would respectfully show the Court that it is joined in a prior petition requesting the physical examination of Robert L. Schlagenhauf with the defendant, Contract Carriers, Inc., which petition has been granted by this honorable Court. This petition was filed by the National Lead Company naming Robert L. Schlagenhauf as a party defendant in its cross-claim, and it is for this reason that this additional petition by National Lead Company is being filed.

As stated above, Robert L. Schlagenhauf, is now a party to the National Lead Company's cross-claim, and his mental and physical abilities concerning the operation of a vehicle is an issue. This defendant respectfully requests that one physician in each of the above listed categories be appointed, and in this regard show the Court that they are competent, qualified licensed physicians in the respective fields as fol- [fol. 71] lows:

(1) Internal medicine:

(a) Richard Nay;

(b) A. Ebner Blatt

(2) Opthalmology:

(a) Dr. Jack I. Taube;

(b) Dr. Richard M. Harding

(3) Neurology:

(a) Dr. Charles Bonsett;

(b) Dr. John Russell;

(c) Dr. Karl Manders

(4) Psychiatry:

(a) Dr. Leo Loughlin;

(b) Dr. Dwight W. Schuster

These examinations can be performed without physical or mental suffering or embarrassment to the defendant, Robert L. Schlagenhauf and without cost to said defendant. The evidence sought by such examinations cannot be produced by other witnesses and is not cumulative, as inquiry into such areas is limited to those persons qualified by training, education and experience and is not a subject of knowledge to the common layman.

Without examinations by a competent qualified physician in each of the fields as listed above, these defendants will be without means to properly present evidence on this issue and will be unable to properly present their defense.

WHEREFORE, the defendant, National Lead Company, moves the Court for an Order requiring the defendant, Robert L. Schlagenhauf, to submit to a physical examination by one qualified specialist in the fields of internal medicine, opthalmology, neurology and psychiatry, at a

[fol. 72] time convenient for the physicians and the said defendant, Robert L. Schlagenhauf.

ROCAP, ROCAP, REESE & ROBB

/s/ JOHN T. ROCAP

By /s/ for KEITH C. REESE
Attorneys for Defendant,
National Lead Company

156 E. Market Street
Indianapolis, Indiana
MElrose 8-7547

* * * * * * *

CLERK'S NOTE

"Brief in support of petition for physical and mental examination" is omitted from the record here as it appears on side folio 10, printed page 10, supra.

[fol. 74]

Respectfully Submitted,

ROCAP, ROCAP, REESE & ROBB

/s/ JOHN T. ROCAP

By /s/ for KEITH C. REESE
Attorneys for National Lead
Company

CERTIFICATE OF SERVICE

The undersigned, one of the attorney's of record for defendants, Contract Carriers, Inc. and Joseph L. McCorkhill, hereby certifies that a copy of the above and foregoing pleading was delivered to:

Townsend and Townsend
403 Indiana Building
120 E. Market Street
Indianapolis, Indiana
Attorneys for plaintiff,
Markiewicz

Smith and Yarling
1313 First Federal Building
Indianapolis 4, Indiana
Attorneys for defendants,
The Greyhound Corp. and
Robert L. Schlagenhauf

Mr. A. L. Payne
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Indianapolis, Indiana

Attorneys for plaintiff, Charles Jones

Mr. Edmund Pawelec
Attorney at Law
517 Western Savings Fund
Bldg.
Philadelphia 7, Pa.
Attorneys for plaintiff
Markiewicz

this 14th day of March 1963
/s/ JOHN T. ROCAP
John T. Rocap

[fol. 75]

RESPONDENT'S EXHIBIT "7" TO ANSWER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

No. IP 62-C-285

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, Plaintiffs,

—vs—

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, JOSEPH L. McCORKHILL, CONTRACT CARRIERS, INC., and NATIONAL LEAD COMPANY, Defendants.

Honorable Cale J. Holder, Judge

This cause came before the Court upon the petition of the defendant, National Lead Company, for an order to examine, physically and mentally, the defendant, Robert L. Schlagenhauf and the Court having considered said petition and it appearing that the physical and mental examination of the defendant, Robert L. Schlagenhauf, is within the pervue of the said Rules of Civil Procedure and can be had without physical or mental embarrassment or cost to the defendant, Robert L. Schlagenhauf; that the evidence sought therein is not cumulative and cannot be had by any other means and that said motion is made in good faith on issues in controversy and is not for the purpose of delay, which said petition is hereby sustained and it is:

[fol. 76] Ordered, that the defendant, Robert L. Schlagenhauf, hereby submit to physical and mental examinations by the following physicians:

(1) Internal medicine:

(a) Richard Nay

(b) A. Ebner Blatt

(2) Opthalmology:

(a) Dr. Jack I. Taube

(b) Dr. Richard M. Harding

(3) Neurology:

(a) Dr. Charles Bonsett

(b) Dr. John Russell

(c) Dr. Karl Manders

(4) Psychiatry:

(a) Dr. Leo Loughlin

(b) Dr. Dwight W. Schuster

these examinations to be conducted at times convenient to the parties and by agreement of the parties, to be completed no later than the 1st day of April, 1963, at the offices of the physicians listed above and if the time for taking said examinations cannot be reached by agreement, the Court will then establish a time certain for the taking of said examinations.

Date March 15, 1963

CALE J. HOLDER
United States District Judge

Copies to: Armstrong, Gause, Hudson & Kightlinger, 626 Fidelity Bldg. 111 Monument Circle, Indianapolis, Indiana; Rocap, Rocap, Reese & Robb, 156 E. Market Indianapolis, Ind.; Townsend and Townsend, 120 E. Market, Indianapolis, Ind.; A. L. Payne, 501 Fidelity Building, Indianapolis, Ind.; Smith & Yarling, 1313 First Federal Building, Indianapolis, Ind.; Sheldon A. Breskow, 930 Lemcke Building, Indianapolis, Ind.; Edmund Pawelec, 517 Western Savings Fund Building, Philadelphia, 7 Pennsylvania

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[fol. 77]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14103 September Term, 1962 April Session, 1963

ROBERT L. SCHLAGENHAUF, Petitioner,

v.

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE, FOR THE SOUTHERN DISTRICT OF INDIANA, Respondent.

On Petition for Writ of Mandamus.

OPINION—July 23, 1963

Before Kiley and Swygert, Circuit Judges, and Grant, District Judge.

SWYGERT, Circuit Judge. Robert L. Schlagenhauf petitions for a writ of mandamus (28 U. S. C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, district judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P.,[1] viz., whether a federal district court has the power to order a mental or physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point.[2]

[fol. 78] Because the question is fundamental, going to the court's power to require a medical examination of a defendant in a civil action, we directed the district judge to show cause why the writ should not issue. After a response to our order had been filed on behalf of the district judge and after briefs had been submitted by the parties to the litigation, oral argument was heard.

A diagrammatic description of the history of the litigation is presented in order to show how the question arises.

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[1] Rule 35 of the Federal Rules of Civil Procedure provides: Rule 35. Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

[2] 8 WIGMORE, EVIDENCE (McNaughton rev. 1961) § 2220 lists many analogous situations arising in the common law, but we are here concerned with a specific application of the term "party" found in Rule 35.

Jennie Markiewicz, John Anthony Markiewicz, Edward Markiewicz (husband and father, respectively, of Jennie and John Anthony), v. The Greyhound Corporation, Robert L. Schlagenhauf, (the driver of the Greyhound bus), Contract Carriers, Inc., Joseph L. McCorkhill, (the driver of Contract Carriers' truck-tractor), National Lead Company (the owner of the trailer being pulled by Contract Carriers).	Diversity action seeking damages for the personal injuries suffered by Jennie and John Anthony Markiewicz, passengers on the Greyhound bus, and for loss of their services sustained by John Markiewicz, all resulting from bus collision with the trailer being pulled by Contract Carriers. The accident occurred July 13, 1962, on U.S. Highway 40 in Hendricks County, Indiana. Complaint was filed July 17, 1962, as amended November 8, 1962.
The Greyhound Corporation, v. Contract Carriers, Joseph L. McCorkhill, National Lead Company, v. General Motors Corporation (third party defendant).	Cross-claim for damages to Greyhound's bus.
National Lead Company, v. Greyhound Corporation, Robert L. Schlagenhauf.	Cross-claim for damages to National's trailer.

[fol. 79] After the original complaint had been amended, Greyhound answered and filed its cross-claim. Contract Carriers and McCorkhill also answered the amended complaint.

Contract Carriers and McCorkhill filed a letter, pursuant to the district court's order, setting forth the specific allegation relied on in defense of Greyhound's cross-claim. Among these allegations is:

> 4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation.

National Lead also filed its answer to the amended complaint together with an answer to Greyhound's cross-claim. One of the defenses asserted to Greyhound's cross-claim was that the negligence of the driver of the bus, Schlagenhauf, proximately caused the damages to the bus owned by Greyhound.

National Lead's cross-claim alleged "that the defendant, The Greyhound Corporation acting by and through its said agent . . . and its said employee, [Schlagenhauf] . . . were guilty of carelessness and negligence in one or more of the following particulars:

> . . . . . .
>
> (8) By permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient.

On February 5, 1963, Contract Carriers, McCorkhill, and National Lead filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to a series of mental and physical examinations. The petitions gave the following reasons for such request:

> (1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of

Flatrock, Michigan, while driving a motorbus for the defendant, Greyhound Corporation.

[fol. 80] (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.

(3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course.

The petition further alleged that separate examinations are required by multiple experts because no one expert could examine Schlagenhauf respective to all the conditions which related to his driving ability. In all four examinations were requested.

The district court on February 21, 1963, granted the petition and ordered Schlagenhauf to submit to mental and physical examinations by two named internists, two named ophthalmologists, three named neurologists and two named psychiatrists, despite the fact that only four examinations had been requested.

On March 14, 1963, Contract Carriers, McCorkhill, and National Lead filed supplemental petitions for examinations of Schlagenhauf. These were supplementary to the original petition allegedly because the mental and physical condition of Schlagenhauf became additionally in issue by virtue of National Lead's cross-claim filed subsequent to the petition of February 5.

On March 15, 1963, the district court issued an order (which superseded its February order) granting the supplemental petitions and ordering Schlagenhauf to appear before the nine medical experts for psychiatric and physical examinations. This court stayed the orders pending our disposition of the instant petition for writ of mandamus.

We are mindful of the stringent restrictions that have been placed on the issuance of the writ of mandamus, and its limitation to "the exceptional case where there is clear abuse of discretion or usurpation of judicial power. . . ." *Labuy* v. *Howes Leather*, 352 U. S. 249, 257 (1957).

In *Labuy*, the Supreme Court, on certiorari to the Seventh Circuit, in language that we deem pertinent to the instant petition said:

> As this Court pointed out in *Los Angeles Brush* [fol. 81] *Corp.* v. *James*, 272 U. S. 701, 706 (1927): ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the Court ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him] . . . (at 256).

Certainly the writ is not to be used as a substitute for appeal. *Ex Parte Fahey*, 332 U. S. 258 (1947). It should not be availed of to correct mere error in the exercise of conceded judicial power, although it may possibly be used to prevent usurpation of power, if "the lower court is clearly without jurisdiction." *Ward Baking Co.* v. *Holtzoff*, 164 F. 2d 34, 36 (2nd Cir. 1947). The writ will not issue to permit this court to exercise the discretion entrusted by law to the district court. *Fisher* v. *Delehart*, 250 F. 2d 265 (8th Cir. 1959); *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7th Cir. 1955).

Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order, or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal, then the writ must and should be denied.

The Supreme Court in *Sibbach* v. *Wilson & Co., Inc.*, 312 U. S. 1 (1941), settled the question whether Rule 35 abridges substantive rights of a litigant in contravention of the limitations against such abridgment specified in the Rules Enabling Act of June 19, 1934, 28 U. S. C. § 723 b-e. The Court held that the rule comes within the ambit of the statute regulating "procedure—the judicial process for

enforcing rights and duties recognized by the substantive law. . . ."

Sibbach is important because the Court there held that Rule 35 constitutes the lawful authority necessary for the exercise of a district court's power to order mental and physical examinations of a party. Without such lawful authority, the Supreme Court had refused to recognize inherent power in federal courts to order physical examinations of the person. In *Union Pac. Ry.* v. *Botsford*, 141 [fol. 82] U. S. 250 (1891), the Court enunciated its rationale for denying inherent power:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." (at 251).
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> • • • • • • •
>
> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. (at 252).

Today, in a number of our states, statutes, rules of court, and in some states, decisions, provide procedural techniques for the discovery of the mental and physical condition of a party similar to that provided for in Rule 35. Numerous decisions, both state and federal, attest to

the soundness of the medical discovery provisions.[3] This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for a mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries. This was the situation in *Sibbach*. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make [Fol. 83] difficult of proof, that which is the very basis of his action and which is particularly within his knowledge.

The fact remains, however, that Rule 35 refers to examination of a "party." It would do violence to the clear wording of the rule to hold that only certain types of parties come within its terms. Obviously those drafting the rules, the Supreme Court, which adopted them, and the Congress that tacitly approved them as discussed in *Sibbach*, were all cognizant of the fact that "party" means both plaintiffs and defendants in civil litigation.

It is well to point out that we do not believe Schlagenhauf became a "party" within the meaning of Rule 35 in so far as the present applications for examinations are concerned until the cross-claim filed by National Lead named him a party defendant (as to Contract Carrier and McCorkhill he is not yet a party). The original suit by Markiewicz, et al., although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit. Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound. Only upon the filing of the cross-claim by National Lead

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[3] For a thorough and scholarly discussion listing statutes and cases, see 8 WIGMORE, EVIDENCE § 2220 (McNaughton rev. 1961). See also: Developments In The Law—Discovery, 74 Harv. L. Rev. 942, 1022-27 (1961).

did Schlagenhauf enter the litigation as a "party" within the ambit of Rule 35 with respect to National Lead's petition for mental and physical examinations.

Rule 35 requires that the person to be examined be a "party" and this requirement is basic to the rule's application. *Dulles* v. *Quan Yoke Fong*, 237 F. 2d 496 (9th Cir. 1956); *Fong Sik Leung* v. *Dulles*, 226 F. 2d 74 (9th Cir. 1955); *Kropp* v. *General Dynamics Corp.*, 202 F. Supp. 207 (E. D. Mich. 1962). We decline to follow the reasoning in *Dinsel* v. *Pennsylvania R.R. Co.*, 144 F. Supp. 880 (W. D. Pa. 1956), that appears to recognize inherent power in a federal court to order physical examinations of persons not parties to the pending action. Such reasoning cannot be accommodated to the language of the Supreme Court in *Botsford* and *Sibbach*. Furthermore, the very terms of Rule 35 restrict such examination to parties.

It should also be pointed out that Schlagenhauf was not a "party" to Greyhound's cross-claim merely by reason of his being an agent of Greyhound. The Supreme Court declined to adopt a proposed amendment to Rule 35 recom-[fol. 84] mended by The Advisory Committee in its Final Report of October, 1955, that would have added the phrase, "or of an agent or a person in the custody or under the legal control of a party," to the rule.[4] In view of that Court's failure to adopt the recommended amendment we decline to extend the coverage of the rule by decision so as to include agents of parties.

What confronts us then is the question of the power of the district court to order, on the application of National Lead, mental and physical examinations of petitioner who became a party defendant by virtue of National Lead's cross-claim. In this regard we must answer the rhetorical question posed in 3 Ohlingers Federal Practice (Rev. Ed.) 610—:

> Finally, in *Sibbach* v. *Wilson & Co.* (1941), 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by a five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that

[4] MOORE FEDERAL PRACTICE ¶ 35.01, at 2552 (Supp. 1962).

> it invades no "substantive" right within the terms of the Enabling Act, as distinguished from a right which is merely "substantial" or "important". To the suggestion that the rule offends the important right to freedom from invasion of the person the court replies that it ". . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule. . . . "
>
> This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to resort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted from the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination.

In the sense that Rule 37 precludes the use of a contempt citation for enforcement of an order to submit to a physical examination, Congress has not consented to the forcible physical examination of litigants in federal courts. It has, however, according to *Sibbach*, consented to district court orders directing a "party" to submit to a mental or physi- [fol. 85] cal examination in actions in which his "mental or physical condition" is "in controversy," if "good cause" for such examination be shown, and Congress has consented to appropriate orders by the district court (short of contempt) in those situations where the "party" refuses to submit to an examination.

In order that a federal district court may properly exercise its power to require a mental or physical examination of a party, Rule 35 requires that the party's mental or physical condition be "in controversy." In a negligence action involving personal injuries of a plaintiff (or of a defendant who by way of counterclaim or cross-claim seeks damages for personal injuries) there is ordinarily no question about that party's mental or physical condition being in controversy. The extent and permanency of his injuries

is one of the ultimate fact issues in the case. In the situation we have here, however, where the party sought to be examined is a defendant who himself is making no claim for damages for personal injuries, the question whether his mental or physical condition is in controversy may be more difficult to decide. See *Wadlow* v. *Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939).

The traditional respect for the inviolability of one's person that our society has consistently fostered—the concern for the individual's rights enunciated by the Supreme Court in the *Botsford* case, must be recognized. Mere lip service to the requirements of "in controversy" and "good cause" in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy. The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered. While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy.

[fol. 86] Here the district court had before it a situation involving a catastrophic motor vehicle accident in which several persons were seriously injured (the Markiewicz, et al. suit potentially involves some $2,000,000.00 in damage claims), and allegations that petitioner had been involved in a similar accident in the past, that petitioner had admitted seeing lights some ten to fifteen seconds prior to impact but made no effort to stop the bus, that the driver of another vehicle was able to clearly see the lights of the truck and trailer over a considerable distance, and that the only human element utilized in the operation of the Greyhound

bus involved in this accident was petitioner. In addition, National Lead alleged that petitioner's poor eyesight was a contributing factor in the accident.

We believe that the several allegations of negligence made in this case together with the additional matters brought to the attention of the district judge relating to the circumstances of the collision are so intertwined with the mental and physical condition of petitioner that that condition may be said to be in controversy in the action for damages asserted by National Lead in its cross-claim.

Although the "in controversy" requirement of Rule 35 is necessarily related to the showing of good cause required of a movant under the rule, the sufficiency of good cause to grant the motion is not restricted to a demonstration that the mental or physical condition of the adverse party is in controversy. The possibility of alternative proof available to the movant and the burden on the party sought to be examined must be balanced against the need for discovery. Furthermore, the number and kind of examinations ordered is subject to the "good cause" requirement. The number of examinations ordered should be held to the minimum necessary considering the party's right to privacy and the need for the court to have accurate information.

In summary, we conclude that a federal district court has the power under Rule 35 to require a party, whether cast in the role of plaintiff or defendant, to submit to a mental or physical examination upon compliance with the conditions of the rule; and in the case at bar that the district court acted within its power in ordering an examination under Rule 35. Petitioner's other contentions, *e.g.*, alleged abuse of discretion in ordering an excessive number of examinations, must await review on appeal from a final judgment.

The petition is denied.

No. 14103.

[fol. 87] KILEY, Circuit Judge, dissenting.

I respectfully dissent.

I agree with the majority opinion that petitioner is a "party" subject to Rule 35. I have some doubt as to whether petitioner's eyes and mentality are "in controversy" within the meaning of the rule.

But my point of departure with the majority opinion is with respect to the "good cause" requirement of the rule. In persuasive dictum in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, 297 F. 2d 921, 924 (4th Cir. 1962), Judge Sobeloff said:

> There appear to be adequate policy reasons for imposing the good cause requirement in Rules 34 and 35. Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate.

The dictum expresses my view.

When the original order was entered, petitioner was not a party, and was made a party only by the later cross-complaint of National Lead Company. The second order issued upon motions merely stating that petitioner was involved in a similar accident while driving a Greyhound bus, that in the instant collision the lights of the tractor-trailer unit were visible from three-fourths to one-half mile, that petitioner saw the red lights of the truck for a period of ten to fifteen seconds prior to impact, and neither reduced his speed nor altered his course; and that unless the examinations were ordered, "defendants will be without means to properly present evidence on this issue," and "no one will be able to testify upon this important issue."

No hearing was held to inquire into these statements so as to form a sound basis for subjecting petitioner to the examinations. A brief hearing might have indicated that there is an adequate alternate method of making proof of petitioner's physical and mental condition; and that the examinations sought now would not shed light on his condition at the time of the accident more than a year ago. On the other hand, the hearing might indicate substantial merit in the grounds urged for the examination order. In either event, the inquiry would establish an adequate basis for [fol. 88] exercising the court's discretion as to whether or not the order ought to issue. The record here discloses no adequate basis for discretion.

This court will issue a writ of mandamus where it finds gross error amounting to an abuse of discretion, as in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955). In my view, on what the district court had before it, there was a gross error amounting to an abuse of discretion committed with respect to ordering the nine examinations, particularly the mental tests.

It is clear from reading Professor Wigmore that he is talking about personal injury cases in 8 WIGMORE, EVIDENCE § 2220(F) (McNaughton rev. 1961), and the need for preventing fraud through concealment of the true nature of one's injury. He quotes at length from Justice Schaefer's opinion in *People ex rel. Noren* v. *Dempsey*, 10 Ill. 2d 288, 292-95, 139 N. E. 2d 780 (1957), where the Justice is speaking about a plaintiff in a personal injury case. Justice Schaefer in that case says that a person claiming damages puts his physical condition in issue and it becomes a fact to be proved, like the fact of the impact in that case. Petitioner did not put his physical and mental condition in issue in the case at bar. These authorities do not compel denial of the writ.

It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here.

[fol. 89]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Before Hon. Roger J. Kiley, Circuit Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Robert A. Grant, District Judge.

ROBERT L. SCHLAGENHAUF, Petitioner,

No. 14103 vs.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, Respondent.

On Petition for Writ of Mandamus.

JUDGMENT—July 23, 1963

This matter comes before the Court on the petition of Robert L. Schlagenhauf for a writ of mandamus, the response of respondent thereto, filed pursuant to a Rule To Show Cause heretofore issued by this Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the said petition of Robert L. Schlagenhauf for a writ of mandamus be, and the same is hereby, Denied, in accordance with the opinion of this Court filed this day.

[fol. 90] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 91]

SUPREME COURT OF THE UNITED STATES

No. 569, October Term, 1963

ROBERT L. SCHLAGENHAUF, Petitioner,

vs.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana.

ORDER ALLOWING CERTIORARI—January 13, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.